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Supreme Court, U.S.
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No. 97-382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID T. SABLAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The government concedes that the Ninth Circuit's *en banc* decision in this case squarely "conflicts" (Opp. 7) with the Seventh Circuit's decision in *United States v. Horton*, 98 F.3d 313, 317-19 (7th Cir. 1997), on the question whether district courts must gauge the extent of departures from the sentencing guidelines by reference to analogous guideline provisions. Given the frequency of departures from the guidelines, that conflict alone warrants this Court's review. But in any event, the circuit conflict is far deeper than the one-to-one split portrayed in the opposition.

The government errs in contending (Opp. 7-8) that the Second, Third and Tenth Circuits have never adopted the Seventh Circuit's position on the question presented here. As explained at length in the petition for certiorari (Pet. 9-14), those courts repeatedly have held that analogous guidelines constrain the permissible extent of departures. *See, e.g., United States v. Kim*, 896 F.2d 678, 684-85 (2d Cir. 1990); *United States v. Kikumura*, 918 F.2d 1084, 1110-19 (3d Cir. 1990); *United States v. Jackson*, 921 F.2d 985, 990-91 (10th Cir. 1990). The government's authority casts no doubt upon these holdings. In *United States v. Campbell*, 967 F.2d 20, 25 (2d Cir. 1992), the sole question presented was whether a departure was "procedurally flawed" because the district court had failed to "articulate on the record reasons for rejecting each intermediate level" between the defendant's actual offense level and the higher offense level to which the court had analogized.[1] In the portion of *Kikumura* cited by the government, the Third Circuit simply reserved the possibility that "there may be cases where the guidelines will not afford useful analogies." 918 F.2d at 1113. Where the guidelines *do* afford such analogies, however, the Third Circuit repeatedly has held that they determine the maximum permissible extent of any departure. *See United States v. Macleod*,

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[1] Although *Campbell* rejected *Kim's* suggestion that district courts must "give specific reasons for their rejection of *each* intermediate offense level," the Second Circuit later confirmed that *Campbell* did not "limi[t] in any way *Kim's* directive" regarding the use of analogies. *United States v. Alter*, 985 F.2d 105, 108 (2d Cir. 1993) (per curiam) (emphasis in original), *cert. denied*, 511 U.S. 1057 (1994).

80 F.3d 860, 867-69 (3d Cir. 1996); *United States v. Bierley*, 922 F.2d 1061, 1068-70 (3d Cir. 1990); *Kikumura*, 918 F.2d at 1114-19. Finally, *United States v. O'Dell*, 965 F.2d 937, 939 (10th Cir. 1992), on its face "*require[s]* the district court to explain the specific degree of departure by providing some method of analogy, extrapolation, or reference to the sentencing guidelines" (emphasis added).

The government also errs in suggesting (Opp. 8) that *Koon v. United States*, 116 S. Ct. 2035 (1996), casts doubt on the Second, Third, and Tenth Circuit decisions. The government glosses over the relevant post-*Koon* cases: *United States v. Malpeso*, 115 F.3d 155, 170 (2d Cir. 1997), in which the Second Circuit expressly reaffirmed *Kikumura* (and therefore *Kim*); *United States v. Baird*, 109 F.3d 856, 872 (3d Cir.), *cert. denied*, 118 S. Ct. 243 (1997), in which the Third Circuit expressly reaffirmed *Kikumura*; and *United States v. Collins*, 122 F.3d 1297, 1309 (10th Cir. 1997), in which the Tenth Circuit not only expressly reaffirmed *Jackson*, but also expressly disapproved the Ninth Circuit decision in this case. Moreover, the government's position simply confuses the standard of review question addressed in *Koon* with the underlying substantive question addressed in *Kim*, *Kikumura* and *Jackson* — the same kind of error that this Court recently and unanimously corrected, in another context, in *General Electric Company v. Joiner*, 66 U.S.L.W. 4036, 4037 (U.S. Dec. 15, 1997) (Slip op. at 4). Indeed, the principle that analogous guidelines constrain the extent of departures cannot possibly be inconsistent with the deferential standard of review adopted in *Koon*, for as the government itself explains (Opp. 10), that principle often allows a wide range of legally permissible outcomes.

Finally, the government acknowledges that *Horton* conflicts not only with the Ninth Circuit decision in this case, but also with First Circuit decisions that have "applied a pure 'reasonableness' standard for some time." Opp. 9, quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989). The government does not, and could not, contend that

Koon casts any doubt on the existence or persistence of the conflict between *Horton* and *Diaz-Villafane*.

2. The government errs in its second contention that the circuit conflict is either "narrow" or without "practical importance" (Opp. 8). Despite allowing the use of analogies (Opp. 9), the Ninth Circuit also allows the district courts, in determining the reasonableness of departure sentences, to ignore even concededly "analogous" guidelines. Pet. App. 12a-13a. And despite possibly allowing the exercise of judgment "independent of the Guidelines" where no analogies are available (Opp. 9), the Seventh Circuit (among others) prohibits the exercise of judgment that is not only "independent" of, but also inconsistent with, the judgments reflected in analogous guidelines. *See, e.g., Horton*, 98 F.3d at 317-19; *United States v. Ferra*, 900 F.2d 1057, 1061-64 (7th Cir. 1990).

The government further errs in asserting (Opp. 9-10) that these different legal standards are unlikely to produce significantly different sentences in individual cases. The cases themselves rebut that contention. For example, by adopting the Seventh Circuit rule in *Kikumura*, the Third Circuit reduced the maximum permissible sentence for the defendant in that case from 360 months to 262 months. *See* 918 F.2d at 1114-19.[2] Conversely, by abandoning the Seventh Circuit rule in this case, the Ninth Circuit increased the maximum permissible sentence for petitioner from (approximately) 120 months to (at least) 240 months. *Compare* Pet. App. 23a-26a (applying Seventh Circuit rule and vacating sentence) *with* Pet. App. 12a-13a (rejecting Seventh Circuit rule and affirming

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[2] Without consulting analogous guidelines, the Third Circuit, applying deferential review, would have had no basis to conclude that a 360-month sentence was unreasonable for a defendant who, after international training, had "manufactured three lethal home-made firebombs from scratch in preparation for a major terrorist bombing on American soil" (918 F.2d at 1089).

sentence).[3] Regardless of whether the Seventh Circuit rule "is capable of *eliminating* disparity" (Opp. 10), it significantly restricts the range of departure sentences that would otherwise be classified as reasonable, and therefore legally permissible.

3. Finally, citing *Braxton v. United States*, 500 U.S. 344 (1991), the government contends that this Court should not resolve the circuit conflict implicated in this case, but instead should "defer to the expertise of the Sentencing Commission" (Opp. 10-11). In *Braxton*, this Court announced that, because the Sentencing Reform Act specifically requires the Sentencing Commission to "review and revise . . . the guidelines" (28 U.S.C. § 994(o)), the Court generally would not grant *certiorari* to resolve circuit conflicts "with respect to the Sentencing Guidelines." 500 U.S. at 348. This case, however, involves a circuit conflict not with respect to the guidelines, but with respect to what constitutes an "unreasonable" departure sentence within the meaning of the Sentencing Reform Act, 18 U.S.C. § 3742(e)(3) and (f)(2). *Compare* Pet. App. 9a *with*, *e.g.*, *Horton*, 98 F.3d at 317 *and Ferra*, 900 F.2d at 1061-62. Even after *Braxton*, this Court

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[3] Although the government questions our calculation of petitioner's maximum permissible sentence under the Seventh Circuit rule (Opp. 10), it does not dispute that analogous guidelines impose only a six-level enhancement to account for the extent of a victim's "permanent or life-threatening" injuries. Pet. 4 n.7; Pet. App. 25a-26a. Moreover, although the government suggests that an additional three-level enhancement is insufficient to account for the fact that this case involves three different victims (Opp. 10), it does not dispute that the appropriate grouping rules (U.S.S.G. § 3D1.4) would produce that result if petitioner's crime had been treated as three separate offenses. Every court of appeals to adopt the Seventh Circuit rule has required application of the grouping rules by analogy. *See*, *e.g.*, *Jackson*, 921 F.2d at 991; *Kikumura*, 918 F.2d at 1112; *Ferra*, 900 F.2d at 1062-63; *Kim*, 896 F.2d at 684. Finally, although the government notes that the district court briefly noted additional considerations (Opp. 10), it does not dispute that the district court's principal consideration was the extent of physical injury to the victims (Pet. App. 30a, 36a).

repeatedly has granted *certiorari* to resolve circuit conflicts involving the proper construction of the Sentencing Reform Act. *See, e.g., United States v. LaBonte*, 117 S. Ct. 1673, 1676-77 (1997); *United States v. Watts*, 117 S. Ct. 633, 634-35 (1997); *Koon v. United States*, 116 S. Ct. 2035, 2043-45 (1996); *Melendez v. United States*, 116 S. Ct. 2057, 2060 (1996); *United States v. R.L.C.*, 503 U.S. 291, 296-99 (1992); *Williams v. United States*, 503 U.S. 193, 198-99 (1992). The Court should continue that settled practice in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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